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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

FLOYD R. BABER,

Petitioner,

vs.

COMMISSION ON RETIREMENT, REMOVAL AND DISCIPLINE,

Respondent.

On Petition for Writ of Certiorari To The Supreme Court Of Missouri

PETITION FOR WRIT OF CERTIORARI

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36 pp

QUESTIONS PRESENTED FOR REVIEW

I

MAY A MISSOURI STATE ASSOCIATE CIRCUIT JUDGE, RETAINED IN OFFICE BY A PUBLIC VOTE, BE REMOVED FROM THAT OFFICE BECAUSE OF THE DECISIONS HE HAS MADE IN CASES PENDING BEFORE HIM INCLUDING CASES THAT INVOLVE A FEDERAL CONSTITUTIONAL ISSUE?

II

WAS PETITIONER AFFORDED DUE PROCESS OF LAW WHEN THE SUPREME COURT OF MISSOURI, IN REMOVING HIM AS A JUDGE, RELIED UPON FINDINGS OF THE RESPONDENT COMMISSION WHICH WERE BASED UPON OPINIONS AND NOT FACTS?

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The Supreme Court of Missouri, in an Original Disciplinary Proceeding, en banc., filed an Opinion on February 23, 1993, concurred in the recommendation of the Commission on Retirement, Removal and Discipline and removed Petitioner from the office of Associate Circuit Judge of Platte County, Missouri. That Opinion is reported at 847 S.W.2d 800. A copy of that Opinion is annexed hereto as Exhibit "A".

Petitioner filed a timely Motion for Rehearing in the Supreme Court of Missouri and said Motion was overruled on March 23, 1993. A copy of the notice of said Order is annexed hereto as Exhibit "B".

STATEMENT OF JURISDICTION

The Supreme Court of Missouri entered its Order, Exhibit "B", overruling and denying Petitioner's timely Motion for Rehearing on March 23, 1993. Thus this Petition for Writ of Certiorari is filed within ninety (90) days of that Order and is, therefore, timely under the provisions of *Title 28, United States Code, Section 2101(d)* and *Rules of the Supreme Court Rule 13.1*, this cause involving a civil cause in the highest court of the State of Missouri.

This Court has jurisdiction to review the final Judgment below by Writ of Certiorari under the provisions of *Title 28, United States Code, Section 1257(a)*, since this cause involves rights, privileges and immunities claimed under the Constitution of the United States.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

United States Constitution:

FOURTEENTH AMENDMENT

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the

privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Constitution of the State of Missouri:

ARTICLE V

Section 1. The judicial power of the state shall be vested in a supreme court, a court of appeals consisting of districts as prescribed by law, and circuit courts.

Section 16. Each county shall have such number of associate circuit judges as provided by law. There shall be at least one resident associate circuit judge in each county. Associate circuit judges shall be selected or elected in each county. In those circuits where the circuit judge is selected under section 25 of article 5 of the constitution the associate circuit judge shall be selected in the same manner. All other associate circuit judges shall be elected in the county in which they are to serve.

Section 17. Associate circuit judges may hear and determine all cases, civil or criminal and all other matters as now provided by law for magistrate or probate judges and may be assigned such additional cases or classes of cases as may be provided by law. In probate matters the associate circuit judge shall have general equitable jurisdiction.

Section 19. Judges of the supreme court and of the court of appeals shall be selected for terms of twelve years, judges of the circuit

courts for terms of six years, and associate circuit judges for terms of four years.

Section 24. 1. There shall be a commission on retirement, removal, and discipline, composed of two citizens who are not members of the bar, appointed by the governor, two lawyers appointed by the board of governors of The Missouri Bar, one judge of the court of appeals to be selected by a majority of the judges of the court of appeals, and one judge of the circuit courts to be selected by a majority of the circuit judges of this state. The commission shall receive and investigate all requests and suggestions for retirement for disability, and all complaints concerning misconduct of all judges, members of the judicial commissions, and of this commission.

* * *

3. Upon recommendation by an affirmative vote of at least four members of the commission, the supreme court en banc, upon concurring with such recommendation, shall remove, suspend, discipline or reprimand any judge of any court or any member of any judicial commission or of this commission, for the commission of a crime, or for misconduct, habitual drunkenness, willful neglect of duty, corruption in office, incompetency or any offense involving moral turpitude, or oppression in office. No action taken under this section shall be a bar to or prevent any other action authorized by law.

* * *

6. Recommendations to the supreme court by the commission shall be made only after

notice and hearing. Rules for the administration of this section and for the procedures thereunder shall be prescribed by supreme court rule unless otherwise provided by law.

* * *

Rules of the Supreme Court of Missouri:

RULE 12.07

(a) ***Investigation***. Upon receipt of a complaint that a judge or a member of any judicial commission or a member of the Commission has committed a crime or is guilty of misconduct, habitual drunkenness, willful neglect of duty, corruption in office, incompetency, or any offense involving moral turpitude, or oppression in office, the Commission shall make an investigation thereof. The Commission may require any such complaint be in writing and verified and that it allege facts. The Commission shall not be required to investigate such complaint if it is obviously unfounded or frivolous.

The judge or commission member shall be notified of the investigation, the nature of the complaint against him, and shall be afforded reasonable opportunity in the course of the investigation to present such matters as he may choose. The notice shall be given by prepaid registered or certified mail, addressed to the judge or commission member at his last known residence.

(b) ***Proceedings After Completion of Investigation***. After completion of an investigation:

(1) Unless at least four members of the Commission find that there is probable cause to

believe the person under investigation is guilty, the Commission shall terminate the investigation, notify the person under investigation and the complainant and close the file.

(2) If at least four members of the Commission find there is probable cause to believe the person who is under investigation is guilty in any of the respects in this Rule 12.07 and further find that a formal proceeding should be instituted, the Commission shall institute such formal proceedings unless the person shall forthwith resign, and the procedure set forth in Rules 12.09 through 12.21 shall be applicable.

(c) ***Proceedings After Completion of Formal Proceedings***. Upon completion of the formal proceedings, if at least four members of the Commission who shall have been present and heard all the evidence find that the person proceeded against is guilty and further find that such person should be removed from office, suspended from the performance of his duties for a period of time, or otherwise disciplined, the Commission shall make written findings of fact and conclusions of law with respect to the issues and shall make its recommendations to this Court.

The Commission shall prepare a transcript of the record of all evidence and of all proceedings therein, which shall also include its findings of fact and conclusions of law and recommendations, and shall file two copies thereof with the clerk of this Court.

After Respondent has had an opportunity to proceed as provided in Rule 12.08, this Court

shall review the record, consider the recommendation of the Commission and make such order as to respondent as it deems just.

RULE 12.08

Upon receipt of two copies of the transcript of the record as provided for in Rules 12.05 and 12.07, the clerk immediately thereafter shall serve one copy of such transcript on the respondent in any manner provided for service under the rules of this Court. Respondent within thirty days after the date of such service may file a brief setting forth any objections he may have to the findings and recommendations of the Commission and argument in support thereof. The Commission may file an answer brief within twenty days after the filing of respondent's brief, and respondent may file a reply brief within ten days after the date of the filing of the Commission's brief. This Court shall set the matter of the recommendations of the Commission for oral argument if requested by respondent. The date of any such setting will be as soon as practicable.

RULE 12.18

The hearing shall be upon the date fixed in the notice or at such later date to which the same shall be adjourned or continued by the Commission.

All hearings shall be in accordance with the rules of this Court and the rules of evidence. Reasonable opportunity shall be afforded the respondent to subpoena witnesses, present evidence and to be heard in person and by counsel.

Revised Statutes of Missouri:

SECTION 375.490

1. Any court of competent jurisdiction, wherein a judgment shall have been recovered against any company by which any securities have been deposited, as by law required, upon a policy issued by such company, and execution issued upon such judgment shall have been returned partly or wholly unsatisfied, shall, upon motion of the plaintiff in such executions, upon three days' notice to said director, order said director to forthwith dispose of enough of said securities at the best price he can obtain for the same to satisfy said judgment, execution and costs, so far as such securities shall suffice; and the director shall, upon realizing the amount necessary to pay said claim, with interest and costs, pay the same into the hands of the officer holding the original execution, and the receipt of said officer to him shall be a full acquittance from any further liability for the amount so turned over; provided, however, that in case of companies organized under the laws of this state, if the director has reason to believe that such company is insolvent, and will not be able to replace the securities to be withdrawn, he shall make return to the order to that effect, and thereupon the execution of such order shall be stayed until the question of solvency is determined; if the company is declared solvent, the director shall satisfy said execution out of said securities as provided; if it is found insolvent, the judgment upon which said execution or order issued shall be liquidated or disposed of in the same manner as is provided by law for

the adjustment of policy claims against insolvent companies.

SECTION 482.335

1. Clerks under the supervision of the small claims court judges shall explain to litigants the procedures and functions of the small claims court and shall assist them in filling out all forms and pleadings necessary for the presentation of their claim or counterclaim to the court. Notice of the fact that clerks will provide such assistance shall be conspicuously posted in the clerks' offices.

STATEMENT OF THE CASE

The Petitioner, Floyd R. Baber, is fifty-three (53) years old and was graduated from law school and admitted to the Missouri Bar in 1964. As a practicing attorney he tried numerous cases. In 1970 he was elected at a public election to the office of Probate/Magistrate Judge in Platte County, Missouri and took office on January 1, 1971. Shortly thereafter that position was divided and Judge Baber assumed the office of Probate Judge. On January 2, 1979 as the result of the amendment to *Article 5* of the Missouri Constitution Judge Baber became an Associate Circuit Judge. Since that time he has, every four years, been retained in office by a public vote under the Missouri non-partisan court plan.

On February 20, 1991 the Commission on Retirement, Removal and Discipline (hereinafter referred to as the "Commission") caused to be forwarded to the Petitioner a

letter notifying him of an investigation regarding his conduct in a particular cause. This complaint was not contained in the subsequent Notice or Amended Notice nor is it mentioned in the Commission's Findings of Fact and Conclusions Law. On June 6, 1991 and August 20, 1991 the Commission caused to be forwarded to the Petitioner letters regarding additional complaints, most of which are the basis of the Notice and Amended Notice.

The original Notice, which formally commenced the proceedings, was forwarded to the Petitioner on or about September 26, 1991.

A hearing was held on the Notice, as amended, on November 7, 1991. During that hearing the Commission offered the letters and responses thereto and rested. Nineteen (19) persons appeared and went on record as supporting Judge Baber. These included lawyers, the Public Administrator, the Assistant Prosecuting Attorney that handled traffic cases, mental health workers, and his two Court Clerks. Letters of support were also offered.

The Petitioner testified in his own behalf. On November 26, 1991 the Commission filed in the Supreme Court of Missouri its Finding of Fact, Conclusions of Law and Recommendation, recommending Petitioner be removed from office. After briefing and argument the Supreme Court of Missouri entered an order remanding the proceeding for further hearing.

The Commission then served its Second Amended Notice which was quite similar to the Notice but now alleged that the Petitioner was not only incompetent but also that he had wilfully neglected his duties as an Associate Circuit Judge. Petitioner filed his response thereto,

in which he objected to the addition of the allegations of willful neglect. On May 11 and 12, 1992, a hearing was held before the Commission.

The Commission hired retired Jackson County Probate Judge George C. Berry to review the files of the Platte County Probate Court. He reviewed approximately 50 files which included the files mentioned in the original notice and several others the clerks provided. He made a letter report of his examinations, which was admitted in evidence. During the hearing the probate clerk and deputy clerk testified as did each of the other Platte County Associate and Circuit Judges. Judge John Yeaman, now retired, who was the presiding judge while Petitioner was serving his twenty one years on the bench, testified he assigned Petitioner to handle those cases he felt he was capable of handling, that he was knowledgeable and qualified to handle those matters, but that he was not competent to handle jury trials. In response to a hypothetical question he expresses the opinion that Petitioner was not competent as an Associate Circuit Judge because one should be able to handle everything, but testified he never received a complaint.

Two other Platte County Judges testified Petitioner was incompetent and one active Judge and one former Judge testified he was competent. The Commission and Petitioner called Attorneys who testified regarding their opinions of Petitioner's competency. Petitioner also testified. No party to any of the cases before Petitioner testified.

On August 28, 1992, the Commission filed its Supplemental Findings of Fact, Conclusions of Law and Recommendation again recommending Petitioner be removed for incompetency and for willful neglect of duty.

On February 23, 1993, the Missouri Supreme Court filed its Opinion (Exhibit A) concurring in the Commission's recommendation and removing Petitioner as an Associate Circuit Judge for the reason of incompetency but did not find the Petitioner had willfully neglected his duties.

Primarily, the finding of incompetency was based on allegations that Petitioner was not assigned by local rule or by order of the presiding judge to hear matters not otherwise within an Associate Circuit Judge's jurisdiction; that he failed to require the filing of some settlements and reports; failed to hold some hearings; failed to require notices to be sent to certain parents of abandoned children where application for guardianship had been filed so they could be enrolled in school or obtain medical treatment; that the Petitioner gave legal advice to small claims court litigants; and made rulings contrary to established law. One of these incidents involved Petitioner ruling that a Missouri statute was unconstitutional under the United States Constitution.

ARGUMENT

REASONS RELIED ON FOR GRANTING THE WRIT

This Honorable Court should exercise its discretion and grant a writ of certiorari herein because the issues presented herein are special and important. This cause

involves an elected judge removed upon recommendation of a commission which is partially composed of laymen, and which thus diminishes the right of the people to vote to retain judges. This cause involves the removal of a judge because of the judicial decisions he was making, thus eliminating the usual remedy of appeal. This cause also involves an attack on the judiciary, which if allowed, will make judges "gun shy" and hesitant to "rock the boat" or to rule outside or contrary to the "established law", thus tending to stagnate the judiciary for fear that someone will make a complaint of incompetency. This cause also involves a finding that Petitioner was incompetent as an Associate Circuit Judge because of matters totally beyond his control, i.e., the presiding judge never assigned him to handle matters beyond his statutory jurisdiction. Petitioner was also faulted for giving legal advice , i.e. telling people how to fill out forms, in small claims matters when such is required by Missouri Statute, *Section 482.335* R.S.Mo.

One of the matters handled by Petitioner, while acting as small claims court judge, was *Jacks vs. United Banker's Life Insurance Company* in which the plaintiff had three separate claims against one insurance company for three unpaid medical bills. The insurance company was in receivership in a State Court in Texas. A $100,000 deposit had been made by that insurance company with the Missouri Division of Insurance. Default judgments were entered against the insurance company and Judge Baber entered an order directing the Missouri Director of the Division of Insurance to pay-over sufficient money to pay those judgments. *Section 482.365.3* R.S.Mo. provides "The Division or deputy clerks serving a Small Claims

Court Judge shall assist judgment creditors . . . in the preparation of forms, available from the Clerk, necessary to obtain satisfaction of a final judgment when no application for Trial De Novo is pending." *Section 375.490* R.S.Mo. authorizes execution against securities deposited with the Division of Insurance when there is a judgment against the insurance company making such deposit. The stay provision in that statute did not apply because of the failure to give proper notice to the insured of the insolvency proceedings.

The stay provision of that statute did not apply because, as Petitioner held, the publication notice to the plaintiff was insufficient since the insurance company knew his address, and therefore Petitioner held the Missouri statute authorizing, in such circumstances, publication service to be unconstitutional. Petitioner was correct in this ruling. See *Mullane vs. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 70 S.Ct. 652 (1950) and *Tulsa Professional Collection Services, Inc. vs. Pope*, 485 U.S. 478, 108 S.Ct. 1340 (1988). This ruling was one of the principal complaints versus Petitioner and was found by the Commission as follows: "(Petitioner's) reasoning as set out in his order indicated that the Uniform Insurer's Litigation Act was unconstitutional and void as to the small claims litigant. Such reasoning was not meritorious and has been described by the attorney for the Missouri Department of Insurance as 'completely out of the ball park'." The Missouri Supreme Court concurred in this finding and it was a basis for holding Petitioner incompetent. Both Federal and State Judges have the duty of protecting constitutional rights. *Goss vs. State of Illinois*, 312 F.2d 257, 259 (7th Cir., 1963).

In no other case has the Missouri Supreme Court removed a judge because of his rulings, indeed it has always previously held that legal errors by a judge are not grounds for discipline and that matters of court administration are not subject to circumspection through disciplinary machinery. *In Re Buford*, 577 S.W.2d 809 (Mo.banc 1978); *In Re Voorhees*, 739 S.W.2d 178 (Mo. banc 1987). The Federal cases agree. *In Re Charge of Judicial Misconduct*, 613 F.2d 768 (9th Cir, 1980).

Petitioner took the bench after being elected, on January 1, 1971, he having been solicited by attorneys to run for the office. While serving as magistrate/probate judge Petitioner handled all misdemeanor, felony preliminary hearings, traffic cases, including DWI's and probate cases. The presiding judge testified the Petitioner was knowledgeable of the law in the areas he assigned to him, that he was qualified to handle those cases and was capable of doing what was assigned to him. When asked about the Petitioner's knowledge of the law he very accurately said "We're all limited to a certain extent". When a judge makes a bad ruling the remedy is an appeal.

A former judge with whom Petitioner shared court facilities, testified they often discussed and argued the law and that Petitioner was knowledgeable in the law. One of leading authorities on probate law in Missouri testified that he had a sharply contested case before Petitioner and that he had good legal knowledge. Judge Berry, the Commission's expert, testified he had one case in front of Petitioner and that he handled it properly.

The charges against Petitioner involve his decisions, rulings, and the administration of his court. He is not charged with oppression in office, dishonesty, or the abandonment of his office. There was no evidence that, or claim that, Petitioner was anything but fair, courteous and a hard worker.

Indeed there was very little factual evidence presented. Primarily the evidence consisted of opinion testimony. *Article 5, Section 24.3* of the Missouri Constitution sets forth what must be established in order to remove a judge from his office. Due process should require that such be established by evidence. The Supreme Court of Missouri relied heavily on the opinions of three of the four other judges in Platte County, two of whom were fellow associate judges during the time in question. One judge is a poor judge of another's competency since he never appears before him and would have no reason to observe the other's competency while on the bench.

Respectfully submitted,

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Seal

SUPREME COURT OF MISSOURI

en banc

IN RE:	)	No. 74372
HONORABLE FLOYD R. BABER,	)	(Filed
Respondent.	)	Feb. 23, 1993)
	)	

ORIGINAL DISCIPLINARY PROCEEDING

I.

This case presents the Court with the unhappy task of deciding whether Floyd R. Baber, a twenty-one-year veteran associate circuit judge, should be removed from office. This proceeding was initiated when the Commission on Retirement, Removal and Discipline filed an eleven-count notice of hearing alleging that Judge Baber is not competent to handle the duties of the office of associate circuit judge. Judge Baber responded by "generally admit[ting] the charges and specifications." The notice was then amended to delete any reference to misconduct or to violations of the Code of Judicial Conduct.

After a formal hearing, Judge Baber explained that he intended to admit the factual allegations made by the commission but not the legal conclusion of his incompetency. This Court concluded that the record was ambiguous and incomplete, and directed the commission to either obtain an unambiguous response from respondent, or to conduct a second hearing and receive evidence that

would provide a complete factual basis for its recommendation.

The commission's second amended notice reiterated the eleven charges and further alleged that the conduct charged constituted willful neglect as well as incompetency. Additional testimony was heard at a supplemental hearing, at which Judge Baber again denied being incompetent. Both the commission and respondent adduced reputation and opinion testimony at this hearing. In addition, the commission elicited expert testimony from a number of judges and attorneys, based upon their personal experiences with Judge Baber and upon their review of the charges and the responses thereto. The record also includes a report prepared by Retired Judge George C. Berry, who was retained by the commission to review the files listed in the notice.

The commission found that ten of the eleven charges had been proved by a preponderance of the evidence and that such conduct constituted incompetency and willful neglect of duty under article V, section 24.3, of the Missouri Constitution. However, the commission found credible Judge Baber's explanation that the incident described in Charge VII was an attempt at levity on his part, and concluded that the behavior charged therein did not constitute misconduct in any event. We do not consider any charge of which the respondent was found not guilty. *In re Elliston*, 789 S.W.2d 469, 471 (Mo. banc 1990).

The commission concluded that respondent lacks the requisite ability, legal qualifications, and fitness to discharge the broad spectrum of duties and responsibilities inherent in the office of associate circuit judge, and that

he consciously disregarded his duties as an associate circuit judge. The commission therefore recommended that he be removed from office.

II.

This Court is not required to adopt the recommendation of the commission in a judicial disciplinary proceeding. The ultimate responsibility to "remove, suspend, discipline or reprimand any judge of any court" is entrusted to this Court. *Mo. Const.*, art. V, § 24.3; *Matter of Buford*, 577 S.W.2d 809, 821 (Mo. banc 1979). Accordingly, we conduct an independent review of the evidence and the commission's fact findings, and where credibility is at issue, we give substantial consideration and due deference to the commission's ability to judge the credibility of witnesses appearing before it. *In re Voorhees*, 739 S.W.2d 178, 181 (Mo. banc 1987); *Buford*, 577 S.W.2d at 821. Because a disciplinary proceeding is civil rather than criminal in nature, the charges must be proved by a preponderance of the evidence. *Elliston*, 789 S.W.2d at 476.

Disciplinary action against a judge is authorized "for the commission of a crime, or for misconduct, habitual drunkenness, willful neglect of duty, corruption in office, incompetency or any offense involving moral turpitude, or oppression in office." *Mo. Const.*, art. V, § 24.3. No discipline may be imposed absent a finding that the respondent has violated at least one of these constitutional standards. *Voorhees*, 739 S.W.2d at 180. An appropriate exercise of judicial discretion is not a violation of the standards and will not subject a judge to discipline.

Elliston, 789 S.W.2d at 475; *Voorhees*, 739 S.W.2d at 180. In the case at bar, the sole grounds charged are incompetency and willful neglect of duty.

III.

No purpose would be served by a detailed discussion of the charges in the second amended notice.[1] The allegations may be summarized as follows:

- Respondent's duties are limited by local court rule to traffic cases (excluding driving while intoxicated and driving while license revoked), small claims cases, and administrative and noncontested probate matters. Respondent is generally disqualified from contested probate matters, does not handle domestic or criminal cases, and is not assigned any jury trials.

- Respondent has failed to take action on matters of concern in court files, even after they have been brought to his attention by the clerks.

- Respondent has failed to follow the law in probate cases. For example, he has failed to require the filing of annual statements and reports by personal representatives and guardians, failed to require that proper notice be given to interested parties, and failed to hold hearings, all in contravention of the applicable probate statutes.

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[1] The notice specifically refers to instances of inappropriate conduct in the handling of thirty-five probate files and one small claims file. Thirty-two of the probate files were reviewed by Judge Berry, as listed in his report to the commission. These incidents, all of which have been admitted by respondent, provide adequate factual support for our conclusion herein.

- Respondent has offered *ex parte* legal advice to litigants who have subsequently appeared before him on the same matter.

- Respondent has ordered defendants or wards of the court who did not exhibit symptoms of alcohol abuse to attend Alcoholics Anonymous meetings, even when the underlying offense was not alcohol-related.

- Respondent allowed a Michigan lawyer to represent an estate and approved an attorney's fee in the matter, although the lawyer had not complied with the requirements of Supreme Court Rule 9 regarding nonresident attorneys.

- Respondent has made a number of rulings that are so far contrary to established law as to demonstrate a lack of understanding of the law, or an unwillingness to apply it.

Judge Baber has admitted the substance of these allegations, both by a general admission and by his responses to individual charges. The only question for us to consider, therefore, is whether these instances of judicial behavior indicate incompetency in the constitutional sense, and are severe and pervasive enough to necessitate his removal from the bench.

This Court's earlier decisions are not particularly helpful in this regard. No prior case had contemplated the imposition of discipline solely on the basis of incompetency. We have stated, however, that "[i]ntelligence, ability and diligence are minimum qualifications expected of every judge." *Elliston*, 789 S.W.2d at 484.

A few other courts have had occasion to define incompetency as grounds for removal from office. The Supreme Court of Florida defined it as "any physical, moral, or intellectual quality, the lack of which incapacitates one to perform the duties of his office." *State ex rel. Hardie v. Coleman,* 155 So. 129, 133 (Fla. 1934). The Supreme Court of Alabama found it is "mere incapacity for the performance of [official] duties." *State ex rel. Brickell v. Martin,* 61 So. 491, 494 (Ala. 1913). The Supreme Court of Oregon held that a "general incompetent performance of judicial duties" was evidenced by "a lack of the knowledge and judgment necessary for the proper administration of justice in our courts." *Matter of Field,* 576 P.2d 348, 354 (Or. banc 1978). In a similar vein, the dictionary defines incompetency as the "[l]ack of ability, knowledge, legal qualification, or fitness to discharge the required duty or professional obligation." *Black's Law Dictionary* 765 (6th ed. 1990). Accordingly, when incompetency is alleged the Court's task is to determine whether the conduct at issue establishes that the respondent lacks the requisite ability, knowledge, judgment, or diligence to consistently and capably discharge the duties of the office he or she holds.[2]

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[2] It would be impractical to attempt to formulate a more concrete test of incompetency. After a review of prior case law, and the facts of this case, it has become evident that these cases are *sui generis* and must necessarily be decided in accordance with their particular facts and with due consideration to the gravity of the allegation and its potential consequences. Hopefully, such cases will never become so routine as to establish or require a more fixed rule of general applicability.

The record below includes the expert opinions of a substantial number of judges and attorneys who testified at the supplemental hearing. It is clear from the transcript that this was a difficult process for many of these witnesses, and we commend their willingness to put aside their personal discomfort in the service of our judicial system.

We gave substantial consideration to the testimony of five active and retired judges, four of whom are past or current colleagues of respondent. Retired Circuit Judge John M. Yeaman served with respondent for twenty-one years. Judge Yeaman testified that he assigned respondent to a limited range of cases because respondent was unable to handle more complex litigation, including jury trials.[3] In Judge Yeaman's opinion, this limitation shows that respondent is not competent to hold office, because an associate circuit judge is expected to perform the same duties as a circuit judge.[4] However, Judge Yeaman denied

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[3] Judge Yeaman was asked if there was any reason why respondent was not assigned any other types of cases. He answered: "I felt that[ ] what he was capable of doing was what I assigned to him." Tr. p. 57. When asked whether respondent was competent to handle jury trials, Judge Yeaman answered: "I don't think he was capable. I guess competence is as good a word." Tr. p. 58.

[4] When asked whether respondent is competent to perform the duties of an associate circuit judge, Judge Yeaman responded: "In this day and age, he's not because I feel that there shouldn't be any difference between an associate circuit judge and a circuit judge. In other words, that judge should be able to handle everything." Tr. p. 67.

that respondent willfully neglected his duties, citing his industriousness, diligence, and integrity.[5]

Judge Ward Stuckey has been the Circuit Judge in Platte County since Judge Yeaman's retirement in February 1992, and had worked with respondent as Associate Circuit Judge for eleven years before that date. Associate Circuit Judge Owens Lee Hull has been on the bench with respondent for fourteen years. Both stated their opinion, based on their personal knowledge of respondent and on the nature of the charges, that respondent is not competent and has willfully neglected his duties.[6] Associate Circuit Judge Daniel Czamanske was newly elected at the time of the hearing and did not wish to state an opinion.

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[5] Tr. p. 68. When asked if respondent has willfully neglected his duties, Judge Yeaman answered: "I don't think he's, at any time, willfully. What he's done, he's felt in his heart was the right thing to do. It's like signing the order [in a specific case] without a hearing, he just didn't think." *Id.*

[6] Tr. pp. 95, 175. These witnesses also described experiences with respondent that support their assessment of his lack of competency. Judge Stuckey testified as follows: "My experience has been that [respondent'] knowledge of the law is not great. . . . [M]y experience is somewhat limited, but some of the cases that have been assigned to me after they were assigned to him, sometimes I had difficulty following his reasoning." Tr. p. 92.

Judge Hull was asked whether respondent consistently follows the law in traffic, small claims, and probate cases. He stated his opinion that respondent "does not consistently do that." Tr. p. 172. To a similar question, Judge Stuckey responded: "He's consistent in that sometimes he doesn't – many times he doesn't follow the law as I have heard it." Tr. p. 94.

However, he opined that, if true, the conduct charged in this case shows respondent is probably not competent.[7]

Finally, Retire Probate Judge George C. Berry expressed his opinion, formulated after a review of the probate files listed in the second amended notice and of the responses to the charges, that respondent is not competent to handle the duties of his office and has neglected those duties.[8]

In addition, the commission presented the testimony of ten lawyers who gave their opinion that respondent is not competent, based on their personal knowledge of respondent and the nature of the charges against him. Six of these witnesses stated that they felt respondent had willfully neglected his duties. Three other witnesses, however, felt that he had not. In particular, two attorneys thought that the nature of his incapacity is such that his neglect of duty could not be considered willful.

In rebuttal, respondent presented the testimony of eight attorneys who stated their opinion, based on their personal knowledge of respondent and the nature of the charges against him, that he is competent to handle the duties of his position and has not neglected them. The commission did not find their opinions persuasive. Although we do not dismiss the cumulative weight of these assessments, we also are not persuaded that they offset the weight of the testimony of the earlier witnesses. They do not negate or explain the troubling experience of

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[7] Tr. p. 194.

[8] Tr. pp. 233-4.

the other witnesses, nor do they establish that such experience was the exception rather than the rule.

Incompetency is demonstrated by a pattern of inappropriate conduct over a period of time. *See In re Conduct of Jordan*, 624 P.2d 1074, 1076 (Or. banc 1981). It need not be shown that the judge's performance is substandard all of the time, or even most of the time. The fact that Judge Baber discharged his duties competently in his interactions with these particular witnesses does not preclude a finding that he cannot do so consistently, as evidenced by the testimony of other witnesses.

It is apparent from this recital that a considerable number of judges and attorneys who have worked with respondent feel that he cannot perform the duties of his office. Several witnesses, notably Judge Yeaman, indicated that respondent is able to handle the limited duties he has been assigned by local court rule. Nonetheless, the conclusion is inescapable that despite his diligent efforts, Judge Baber is no longer capable of discharging all the responsibilities of his position. This assessment is supported by the charges contained in the second amended notice and admitted by respondent. Moreover, the number and extent of the charges, as well as their recurrence over a period of years, prevent us from concluding that we are dealing with isolated incidents that are unlikely to be repeated. Whether or not he could continue to function as a judge in some limited fashion, we find it has been proven by a preponderance of the evidence that Judge Baber is not capable of performing all the duties required by law to be performed by an associate circuit judge. § *478.220*, RSMo Supp. 1992. Accordingly, we hold

that Judge Baber has been shown to be incompetent under article V, section 24.3 of the constitution.

We arrive at a different determination on the issue of willful neglect. The expert testimony is inconclusive: Of those witnesses expressing an opinion on this issue, twelve felt that respondent had not willfully neglected his responsibilities, whereas nine others believed that he had. Moreover, a finding of willful neglect is inconsistent with the repeated testimonials in the record as to Judge Baber's honesty and good intentions.

We have carefully examined the record, and especially Judge Baber's testimony, for indications of intentional breach or abandonment of his official duties. Rather than neglect, we found abundant evidence of a heavy work load, hard work, and long hours. It also appears that respondent's habitual noncompliance with statutorily mandated procedures resulted from a lack of understanding of the law, or a misapprehension as to its significance. Therefore, we find that Judge Baber did not willfully neglect the duties of his judicial office.

Our holding does not imply that a judge must fear removal after every misstep. It would be unreasonable and unfair to expect every judge in our courts to be without occasional error or misjudgment, perfection not being typical of the human condition. *See In re Jordan,* 622 P.2d 297, 316 (Or. 1981). We do not reach our conclusion in this case based on any one incident or charge, but rather on a recurrent pattern of mistaken rulings over a period of years. *Accord, Conduct of Jordan,* 624 P.2d 1076.

A competency determination must remain focused on the judge's ability to consistently follow and apply the

law over time. This is not a matter of incidental or isolated mistakes. Neither is it an issue of popularity. It is practically certain that every judge will err sometimes. It is also certain that many litigants and lawyers will be disappointed by a judge's decisions, even when he or she is not in error. Neither occasional error, nor unpopularity, is a ground for discipline.

Instead, when it is shown that one of our judges has grown unable to effectively discharge the duties of his or her office, and that there is no reasonable hope that the judge may regain that ability, we are compelled to act to preserve the public's confidence in our courts. As noted by Judge Welliver, "It is in the trial courtroom that the public has its direct contact with the judicial system and that the public formulates its opinion as to the fairness and the integrity of the system." *Buford*, 577 S.W.2d at 858 (Welliver, J., concurring in part and dissenting in part); *see also Field*, 576 P.2d at 355. In this case, the integrity of the system requires Judge Baber's removal from office.

IV.

We wish to emphasize that respondent has *not* been shown to be guilty of misconduct, corruption, or oppression in office. Many of the witnesses attested to Judge Baber's courtesy, diligence, sense of fairness, and genuine desire to help the people who come before his court. Their testimony indicates that he is held in high regard as a person, if not always as a jurist. Nor has it been proven by a preponderance of the evidence that Judge Baber willfully neglected his duties. In fact, the weight of the evidence establishes his desire to serve well.

The record simply demonstrates that respondent is no longer capable of carrying out all of the duties of an associate circuit judge, and the nature and pervasiveness of the charges against him make it unlikely that he will be able to improve his performance after a period of suspension. Therefore, we concur in the commission's recommendation and hereby remove respondent from office for incompetency. *Mo. Const.*, art. V, § 24.3.

V.

In consideration of the foregoing, it becomes appropriate to determine whether the retirement disqualification statutes are triggered by our decision. These statutes provide as follows:

> **476.480. Judges convicted, impeached or removed from office ineligible.** – Sections 476.450 to 476.510 [election to become special commissioner] shall not apply to any person who has been convicted of a felony in any court or who has been impeached or removed from office for misconduct.
>
> **476.560. Disqualification by improper behavior.** – Except as provided in section 476.540, the benefits under sections 476.515 to 476.570 [retirement benefits] shall not apply to any judge who has been convicted of a felony in any court or who has been removed from office by impeachment or for misconduct or disbarred from the practice of law.

The only potential ground for disqualification in this case is misconduct. This term means a transgression,

dereliction, unlawful or wrongful behavior, or impropriety that is willful in character. *Black's Law Dictionary* 889 (6th ed. 1990). This Court has previously used "misconduct" as a convenient collective term for several constitutional standards for removal that connote wrongdoing, including "oppression in office" and "willful neglect of duty." *Voorhees*, 739 S.W.2d at 180.

Incompetency, on the other hand, denotes an inherent incapacity that need not be coupled with willful wrongdoing. *Martin*, 61 So. at 494. When unaccompanied by wrongful behavior or malicious intent, incompetency does not constitute misconduct. Accordingly, we hold that Judge Baber's removal from judicial office on the basis of incompetency alone does not trigger the disqualification statutes, *§§ 476.480* and *476.560*, RSMo 1986.

WILLIAM RAY PRICE, JR.,
JUDGE

All concur.

Seal

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March 23, 1993

Mr. Donald T. Norris
2800B Kendallwood Parkway
Kansas City, Missouri 64119

In re: Honorable Floyd R. Baber
Supreme Court No. 74372

Dear Mr. Norris:

Please be advised that the Court this day entered the following order in the above-entitled cause:

"Respondent's motion for rehearing overruled."

Yours very truly,

THOMAS F. SIMON

/s/ Mary Elizabeth McHaney
Mary Elizabeth McHaney
Deputy Clerk, Court en Banc

/csm

cc: Mr. James M. Smith